

Appendix C
Cultural Resources Programmatic Agreement

**Programmatic Agreement Among the
USDI Bureau of Land Management, Nevada and the
Nevada State Historic Preservation Officer
Regarding the Toquop Energy Project**

**PROGRAMMATIC AGREEMENT
AMONG
THE USDI BUREAU OF LAND MANAGEMENT, NEVADA
AND
THE NEVADA STATE HISTORIC PRESERVATION OFFICER
REGARDING THE TOQUOP ENERGY PROJECT**

WHEREAS, the BLM is considering an application for rights of ways and a proposed land exchange for the Toquop Energy Project proposed by Toquop Energy, Inc., ("Toquop") in southern Lincoln County, Nevada, and BLM is preparing an Environmental Impact Statement for this proposed project.

WHEREAS, the BLM has determined that if it approves this application and/or the land exchange, the construction and installation of the Toquop Energy Project (the undertaking) may have an effect upon properties eligible for inclusion in the National Register of Historic Places (NRHP), and has consulted with the Nevada State Historic Preservation Officer (SHPO) pursuant to the Nevada BLM/SHPO Protocol for implementing Section 106 of the National Historic Preservation Act;

WHEREAS, Toquop Energy, Inc., the operator of Toquop Energy Project, participated in the consultation and has been invited to concur in this Programmatic Agreement, and

WHEREAS, this Programmatic Agreement covers all aspects of the planning, construction, and installation of the undertaking, including but not limited to, power and communication transmission systems, generation stations, staging areas and access roads, the construction zone, extra work areas and all ancillary facilities;

NOW THEREFORE, the parties agree that development of the Toquop Energy Project, if it is approved by BLM, shall be administered in accordance with the following stipulations to ensure that historic and prehistoric properties will be treated to avoid or mitigate effects to the extent practicable, regardless of surface ownership, and to satisfy BLM Section 106 responsibilities for all aspects of the undertaking.

AREA OF POTENTIAL EFFECT

The Area of Potential Effect (APE) shall be defined to include all potential direct and indirect effects to cultural resources and Traditional Cultural Properties from any Toquop Energy Project activities associated with the undertaking, if it is approved by BLM. The initial specific APE is described and mapped in Appendix A. At the discretion of the BLM, the APE may be amended as needed and any amendments will be handled under the terms of this agreement.

STIPULATIONS

A. Identification

1. BLM shall identify interested persons and tribes pursuant to the BLM/SHPO Protocol and involve them, as appropriate, in all activities associated with the undertaking.
2. The BLM, in consultation with the SHPO, shall ensure that Toquop funds an appropriate cultural resource inventory, including reports, of the APE for all activity areas, or portions thereof, in a manner consistent with the BLM/SHPO Protocol.
3. Required inventory shall be completed regardless of the ownership (public or private) of the lands involved and Toquop shall be responsible for gaining access to privately held lands. Toquop's failure to gain access to private lands will result in a determination of adverse effect for the undertaking.

B. Eligibility

1. The BLM, in consultation with the SHPO, shall ensure that all cultural resources located within the APE of an activity area are evaluated for eligibility to the NRHP prior to the initiation of activities that may affect cultural properties. Eligibility will be determined in a manner compatible with BLM/SHPO Protocol.
 - a. In addition, the BLM shall consult with appropriate tribes to identify properties considered to be of traditional religious and cultural importance.
2. To the extent practicable, eligibility determinations shall be based on inventory information. If the information gathered in the inventory is inadequate to determine eligibility, Toquop, through its contractors may need to conduct limited subsurface testing, or other evaluative techniques, to determine eligibility. Subject to approval by the BLM, in consultation with the SHPO, evaluative testing is intended to provide the minimum data necessary to define the nature, density and distribution of materials in potential historic properties, to make final evaluations of eligibility, and to devise treatment options responsive to the information potential of the property. Any such testing shall be limited to disturbing no more than 25% of the surface area of the resource. Should BLM disapprove the applications for the Toquop project, or should Toquop abandon the project and withdraw its applications prior to BLM approval, then any further evaluative testing shall cease, except for completing existing or already authorized work that is ongoing as of the date of withdrawal or disapproval.
3. If any of the parties disagree regarding eligibility, the BLM shall notify all parties and seek a determination of eligibility from the SHPO. If the BLM and SHPO disagree regarding eligibility, the BLM shall seek a formal determination of eligibility from the Keeper of the National Register in accordance with 36 CFR 800.4 (dated 1986). The Keeper's determination will be considered final.

C. Treatment

1. In avoiding or mitigating effects, the BLM, in consultation with SHPO and interested persons, shall determine the precise nature of effects to historic properties identified in the APE if the Toquop Project is approved by BLM. As a condition to any grant of rights of way or other BLM action to approve the Toquop Project, appropriate treatment shall be required prior to construction or operation of the Project. If the Project is approved by BLM, all treatment shall be done in a manner consistent with the BLM/SHPO Protocol.
2. If the Toquop Project is approved by BLM, to the extent practicable, BLM, in consultation with the SHPO, shall ensure that Toquop avoids effects to historic properties through project design, or redesign, relocation of facilities, or by other means in a manner consistent with the BLM/SHPO Protocol.
3. If the Toquop Project is approved by BLM, when avoidance is not feasible, the BLM, in consultation with SHPO, Toquop and interested persons, shall ensure that Toquop develops an appropriate treatment plan designed to lessen or mitigate project-related effects to historic properties. The treatment plan shall be a condition to the right of way, if the right of way is approved by BLM. For properties eligible under criteria (a) through (c) (36 CFR 60.4), mitigation, other than data recovery, may be considered in the treatment plan (e.g. HABS/HAER recordation, oral history, historic markers, exhibits, interpretive brochures or publications, etc.). Where appropriate, treatment plans shall include provisions (content and number of copies) for a publication for the general public.
4. If the Toquop Project is approved by BLM, when data recovery is proposed and required as a condition of approval, the BLM, in consultation with the SHPO, shall ensure that Toquop develops a data recovery plan that is consistent with the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation (48 FR 44716-37) and *Treatment of Historic Properties: A Handbook* (Council 1980).
6. If the Toquop Project is approved by BLM, Upon completion of the consultation process, the BLM shall require as a condition of approval and ensure that Toquop, through its contractor, implements the fieldwork portions of any final treatment plan prior to initiating any activities that may affect historic properties
7. The BLM shall ensure that all records and materials resulting from identification and treatment efforts are curated in accordance with 36 CFR 79 in BLM-approved facilities in Nevada. All materials collected will be maintained in accordance with 36 CFR 79 until the final treatment report is complete and collections are curated or returned to their owners.
8. The BLM shall ensure that all final archeological reports resulting from actions pursuant to this Agreement will be provided to the SHPO and the Advisory Council on

Historic Preservation (Council), and made available to other interested persons. All such reports shall be consistent with contemporary professional standards, and the Department of Interior's Formal Standards for Final Reports of Data Recovery Programs (42FR 5377-79).

D. Discovery Situations

1. If the Toquop Project is approved by BLM, and authorization has been granted for Toquop to proceed to construct or operate the undertaking, the following requirements shall apply. When cultural resources are discovered, undertaking-related activities within 100 meters of the discovery will cease immediately and Toquop shall notify the BLM authorized officer. Prior to initiating any activities within the APE, Toquop will provide the parties with a list of, and schedule for, the Toquop employees empowered to halt all activities in discovery situation and who will be responsible for notifying BLM of any discoveries. At least one of these employees will be present during all Toquop's activities.

(a) The BLM shall notify the SHPO and consider the SHPO's initial comments on the discovery. Within two working days of the discovery, the BLM shall notify Toquop, the SHPO and identified interested persons, of the BLM's decision to either allow undertaking-related activities to proceed or to require mitigation.

(b) If, in consultation with the SHPO, BLM determines that mitigation is appropriate, the BLM shall solicit comments from the SHPO and interested persons, as appropriate, to develop mitigating measures. The SHPO and other interested persons, as appropriate, will be allowed two working days to provide BLM with comments to be considered when the BLM makes a decision on extent of mitigative efforts. BLM will determine the mitigation required; within seven working days of BLM's notification to Toquop of the need for mitigation, BLM will notify the SHPO and appropriate interested persons of its decision and ensure that such mitigative actions are implemented.

(c) The BLM shall ensure that reports of mitigation efforts for discovery situations are completed in a timely manner and conform to the Department of Interior's Formal Standards for Final Reports of Data Recovery Program (42 FR 5377-79). Drafts of such reports shall be submitted to the SHPO for a 30-day review and comment as stipulated in H.2. Final reports shall be submitted to the SHPO, Council and interested persons for informational purposes.

(d) Cogentrix's activities in the area of the discovery will be halted until Toquop is notified by the BLM that mitigation is complete and activities can resume.

E. Other Considerations

1. The BLM shall ensure that all stipulations of this Agreement are carried out by the BLM, SHPO, Toquop, and all of its contractors or other personnel.
2. The BLM shall ensure that historic, architectural, and archaeological work conducted pursuant to this Agreement is carried out by, or under the direct supervision of persons meeting qualifications set forth in the Secretary of the Interior's Professional Qualification Standards (36 CFR 61) and who have been permitted for such work on public lands, by the BLM.
3. Toquop, in cooperation with the BLM and the SHPO, shall ensure that all its personnel, and all the personnel of its contractors, are directed not to engage in the illegal collection of historic and prehistoric materials. Toquop shall cooperate with the BLM to ensure compliance with the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470) on public lands and with Nevada statute NRS 383 for state and private lands.
4. Toquop shall bear the expense of identification, evaluation, and treatment of all cultural properties directly or indirectly affected by Toquop Energy Project-related activity. Such costs shall include, but not be limited to, pre-field planning, field work, post-fieldwork analysis, research and report preparation, interim and summary report preparation, publications for the general public, and the cost of curating project documentation and artifact collections. It is understood that BLM may decide not to approve the right of way applications or the land exchange for the Toquop Energy Project. Prior to any BLM decision to approve or disapprove the applications, Toquop has agreed to bear the expense of the identification and evaluation of cultural properties required as part of the cultural resources surveys necessary to obtain information for the Environmental Impact Statement. If BLM disapproves the applications, or if Toquop abandons or withdraws its pending application for right of way prior to a BLM decision, then Toquop shall no further expense for evaluation or treatment for any cultural properties except for completing existing or already authorized work that is ongoing as of the date of withdrawal or disapproval.
5. Identification, evaluation and treatment efforts may extend beyond the geographic limits of the right-of-way when the resources being considered extend beyond the right-of-way. No identification, evaluation or treatment efforts will occur beyond that necessary to gather data for the completion of the Section 106 process as agreed, prior to BLM's decision to approve or disapprove the submitted applications. If BLM disapprove the applications, or if the applications are withdrawn or abandoned, then no further identification, evaluation or treatment will occur except for completing existing or already authorized work that is ongoing as of the date of withdrawal or disapproval. .
6. Traditional Cultural Properties (TCPs) will be identified, evaluated, and treated through consultation with appropriate interested persons. Toquop can contract for data gathering to assist the BLM in identifying, evaluating and treating TCPs. However, formal consultation, as needed, will be done by the BLM. TCP identification, evaluation and treatment efforts shall be consistent with BLM Manual 8160 and its associated

handbook.

7. Information on the location and nature of all cultural resources, and all information considered to be proprietary by tribes, will be held confidential to the extent provided by the NHPA, NAGPRA, and ARPA.

8. The BLM shall ensure that any human remains, grave goods, items of cultural patrimony, and sacred objects, encountered during the undertaking are treated with the respect due such materials. In coordination with this Agreement, human remains and associated grave goods found on public land will be handled according to the provisions of the Native American Graves Protection Act (NAGPRA) and its implementing regulations (43 CFR 10). Human remains and associated grave goods found on state or private land will be handled according to the provisions of Nevada statute NRS 383.

9. The BLM and the Nevada State Historic Preservation Office (SHPO) have consulted formally and have discussed informally about various aspects of the Toquop Energy Project. In relation to the land exchange included as part of the Proposed Action (Appendix A), the BLM and SHPO have consulted and agreed that the area of Section 36, T.11S, R.69E, has been subject to cultural resources inventory adequate to identify the likelihood of historic properties, pending determination of whether any Traditional Cultural Properties are present. The BLM anticipates consultation with SHPO regarding a BLM proposal to subject Section 4, T.10S, R.69E to a Class 2-level cultural resources inventory. The BLM expects that the remainder of the proposed and alternative alignments, including those areas yet to be defined, will be subjected to Class 3 cultural resources inventory.

F. Monitoring

1. The BLM and the SHPO may monitor actions carried out pursuant to this Agreement.
2. Any areas that the BLM, in consultation with the SHPO, identifies as sensitive will be monitored by an appropriate professional or tribal representative during construction activities that may impact the area, if the applications are approved by BLM. Treatment Plans will contain monitoring plans as needed. Monitors shall be empowered to stop work to protect resources.

G. Notices to Proceed

If BLM decides to approve the submitted applications, the right of ways issued under these applications shall provide for the issuance of Notices to Proceed. Notices to Proceed (NTP) may be issued by the BLM to Toquop for individual construction activities as defined by Toquop in its Construction Plan, under any of the following conditions:

- (a) the BLM and SHPO have determined that there are no cultural resources

within the APE for the construction segment;

(b) the BLM and SHPO have determined that there are no historic properties within the APE for the construction segment; or

(c) the BLM after consultation with the SHPO and interested persons has implemented an adequate treatment plan for the construction segment, and

(1) the fieldwork phase of the treatment option has been completed;

(2) the BLM has accepted a summary description of the fieldwork performed and a reporting schedule for that work; and

(3) Toquop has posted a surety as stipulated in I. below for post-fieldwork costs of the treatment plan.

H. Time Frames

1. Reports: The BLM shall review and comment on any report submitted by Toquop within 30 calendar days of receipt.

2. Consultation with Interested Parties: Prior to SHPO consultation, the BLM shall submit the results of all identification and evaluation efforts, including discovery situations, and treatment plans to identified interested persons for a 30-day review and comment period.

3. SHPO Consultation: The BLM shall submit the results of all identification and evaluation efforts, including discovery situations, and treatment plans to the SHPO for a 30-day review and comment period.

4. If any party to the agreement, or other interested person fails respond to the BLM within 30 days of the receipt of a submission, the BLM shall presume concurrence with the BLM's findings and recommendations as detailed in the submission and proceed accordingly.

5. Reports: A draft final report of all identification, evaluation, treatment or other mitigative activities will be due to the BLM within nine (9) months after the completion of the fieldwork associated with the activity, unless otherwise negotiated.

6. Curation: All records, photographs, maps, field notes, artifacts, and other materials collected or developed for any identification, evaluation, or treatment activities will be curated in a facility approved by the BLM at the time the final report associated with that activity is accepted by the BLM, unless materials and artifacts must be returned to the owner.

I. Surety Bonds

1. If BLM decides to approve the applications for rights of ways, the terms of the rights of way(s) issued by BLM shall provide for the posting of sureties after such approval for the protection of cultural properties, as set forth below. If BLM decides to disapprove the application, then no surety shall be provided. Under the terms of any BLM approval of the proposed undertaking, Toquop will post a surety with the BLM in an amount sufficient to cover all post-fieldwork costs associated with implementing a treatment plan or other mitigative activities, as negotiated by Toquop when they contract for services in support of this Agreement. Such costs may include, but are not limited to post-field analyses, research and report preparation, interim and summary reports preparation, and the curation of project documentation and artifact collections in a BLM-approved curation facility. The surety shall be posted prior to BLM issuing a notice to proceed.
2. The surety posted as provided in Section I (1) above shall be subject to forfeiture if the post-fieldwork tasks are not completed within the time period established by the treatment option selected; provided, however, that the BLM and Toquop may agree to extend any such time periods. The BLM shall notify Toquop that the surety is subject to forfeiture and shall allow Toquop 15 days to respond before action is taken to forfeit the surety.
3. The surety shall be released, in whole or in part, as specific post-fieldwork tasks are completed and accepted by the BLM.

J. Dispute Resolution

1. If any party to this agreement, or an interested person, objects to any activities proposed pursuant to the terms of this agreement, the BLM shall consult with the objecting party and the SHPO to resolve the issue. If the BLM determines that the objection cannot be resolved, the BLM shall request the assistance of the Council to help resolve the objection.
2. The Parties may continue all actions under this Agreement that are not the subject of the dispute.

K. Amendment

Any party to this Agreement may request that this Agreement be amended, whereupon the Parties will consult to consider such amendment.

L. Termination

Any party to this Agreement may terminate the Agreement by providing thirty (30) days notice to the other Parties, provided that the Parties will consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination.

M. Execution

1. Execution and implementation of this Agreement evidences that the Parties have satisfied their Section 106 responsibilities for all actions associated with the construction and installation of Toquop Energy Project.
2. In the event that the Parties do not carry out the requirements of this Agreement or it is terminated, the BLM will comply with the provisions of the BLM/SHPO Protocol.
3. This Agreement shall become effective on the date of the last signature below, and shall remain in effect until terminated as provided in Stipulation L, or until undertaking is completed, or three years from the effective date.

CONSULTING PARTIES:

BUREAU OF LAND MANAGEMENT, NEVADA

By:

Date:

Title:

NEVADA STATE HISTORIC PRESERVATION OFFICE

By:

Date:

Title:

**CONCURRING PARTY:
TOQUOP ENERGY, INC.**

By:

Date:

Title:

APPENDIX A: AREA OF POTENTIAL EFFECT

The Toquop Energy Project includes three alternatives other than the No Action Alternate. These are discussed briefly below and are depicted in the attached figures.

The Proposed Action (or Southern Alternative) includes improvements (paving, widening, some straightening) to 12.2 miles of existing Entry Road extending from Interstate Highway 15 in Clark County and into a proposed plant site in Lincoln County, Nevada; a land exchange of the federally-administered area of Section 36, T.11S, R.69E (Proposed Plant Site) in return for the privately-owned Section 9, T.20N, R.23E, in the Pah Rah Range in Washoe County, Nevada; construction of a natural gas-fired, water-cooled electrical generating facility in the Proposed Plant Site; construction of an underground Water Pipeline and related utility corridor to carry cooling water from Tule Basin to the proposed power plant site; and drilling of several water wells in the Well Field at locations that are yet to be determined, with connections between each well and the north end of the Water Pipeline within Section 4, T.9S, R.69E. However, the wells and their pipeline locations cannot be determined at present (November 2001) pending accumulation of additional information. The Proposed Action includes connections to both an existing natural gas pipeline (Kern River) as well as an existing electrical transmission line (Navajo-McCullough) within Section 36.

Alternative 1 is identical to the Proposed Action except for utilization of an eastern alignment for the Water Pipeline. This route is slightly longer (12.4 miles) and involves crossing Toquop Wash in order to avoid a nearby Area of Critical Environmental Concern.

Alternative 2 would involve development of the electrical generating plant in Section 4, T.10S, R.69E, which would be substituted as the federally-owned component utilized for the land exchange to acquire the privately-owned area of Section 9, T.20N, R.23E, in the Pah Rah Range in Washoe County, Nevada. The southern portion of the Entry Road would stay the same into Section 36, T.11S, R.69E, and would extend northward to Section 4 following the eastern alignment discussed in Alternative 1. The requirements for water wells in the Tule Desert remain the same, as would the connections between those wells and the alternative electrical generating plant site. The greatest difference would be in the requirement to connect between the electrical generating plant location in Section 4 and the natural gas supply and electrical transmission lines to the south. This would include improvements such as widening and paving along an additional 13.4 miles of road, as well as construction of 13.2 miles of buried gas line and an electrical transmission interconnection.